

Pappy's Pizza, LLC,
d/b/a Pappy's Pizza
19054 Main Street
Metamora, Indiana 47030

Permit No. RR24-20585

District 4

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

BACKGROUND OF THE CASE

The Permittee, Pappy's Pizza, LLC, d/b/a Pappy's Pizza, 19054 Main Street, Metamora, Indiana 47030 (Permittee) is the applicant of a type 111 and 220 Alcohol and Tobacco Commission (ATC) permit, #RR/SS24-20585.¹ On or about August 4, 2003, permittee filed its application for the permit which was assigned to the Franklin County Local Alcoholic Beverage Board (LB) for hearing. The LB heard the application request on October 16, 2003 and on that same date, voted 4 – 0 to deny the application.² The ATC adopted the recommendation of the LB on October 21, 2003 and denied the application.

The permittee filed a timely notice of appeal and the matter was assigned to the ATC Hearing Judge, Mark C. Webb (HJ). The HJ set the matter for hearing on January 20, 2004, and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The permittee was represented by attorney Clyde Williams. There were no remonstrators. The HJ took judicial and administrative notice of the entire contents of the file in this matter and now submits his Proposed Findings of Fact and Conclusions of Law to the ATC for consideration.

II.

EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the LB in favor of the permittee in this cause:
1. Yvonne Brockman-Lucas and John Lucas, owners of the proposed permit premises. They testified that they were operating a pizza

¹ Beer and wine (restaurant) permit located in an unincorporated area with an attached Sunday sales permit. This arrangement (the attached Sunday sales permit) requires the sale of the lesser of \$100,000 in food per year or 50% gross sales must be in food exclusive of alcohol. *See*, IC 7.1-3-16.5-2. In the alternative, because this is a 2-way permit as opposed to a 3-way permit (includes liquor), permittee could hold the permit without the required food sales by dropping the Sunday sales request, or by securing a Sunday sales permit under the provisions of IC 7.1-4-4.1-9(d)(2).

² The LB determined that there was no need or desire for the services citing the provisions of 905 IAC 1-27-4.

restaurant with 11:00 a.m., to 9:00 p.m., operating hours. They in addition to on-premises consumption, they anticipated delivering pizza to customers in Metamora, Brookville and Laurel. Due to a recent town-wide festival, they got a temporary permit and had no problems. They have the support of their patrons and others in the local area who wish for them to be able to sell beer and wine in their establishment. They were previous owners for five (5) years of a package liquor store in Centerville and have never had any trouble with the Commission. In response to concerns that patrons would drink excessive amounts of beer at his location, Mr. Lucas indicated that at \$3.50 per beer, most people who ordered a beer would only drink one. He said that the Hearthstone Restaurant³ has not made problems for Metamora and that there is no reason to think his premises would do so either. At a point later in the hearing, Ms. Lucas lamented that everyone was worried about the potential problems with alcohol and nobody wanted to give her a chance to show she could run an appropriate permit location. The property is appropriately zoned for its use. She said that they, like others, have invested a significant amount of money in their business establishment and have not yet heard a legal reason as to why they should not get this permit. She reiterated that they have the support of their customers who want the permit placed there. She further stated that with the state budget deficit being what it is, that she fails to understand the rationale for denying her a permit which would enable her to make more money, thus making greater sales tax payments to the state.⁴

2. George Ginther, owner of the Train Place in Metamora. He has been to the Lewis' place of business and believes that it is a very well run establishment which serves good food and is very neat and clean. He does not believe that granting a beer and wine permit to this establishment will cause the problems of which the remonstrators complain. He believes that Metamora is ready for this type of establishment and that at \$3.50 per beer, not very many local individuals will partake.⁵

B. The following exhibits were introduced before the LB in favor of the permittee in this cause:

1. Petition containing approximately 122 names and addresses and/or telephone numbers of patrons of the proposed permit premises in favor of the permit application in this matter.

³ A restaurant located on U.S. 52 about ½ mile outside of Metamora and away from the Main Street district where the proposed permit premises is located. This restaurant is the closest location to the Main Street district where alcohol is served.

⁴ This is not a valid reason for why a permit should be granted.

⁵ It appears that from his perspective, those who object the most will not be patronizing the premises and thus not affected by the granting of the permit.

2. Petition containing approximately 40 names and addresses of individuals in favor of the permit application in this matter.
- C. The following individuals testified before the LB in favor of the remonstrators and against the permittee in this cause:
1. Jim Howell, a local restaurant owner. He tried several years earlier to get a three (3) way permit and was turned down.⁶ Although he did not understand then, he understands now the opposition to alcohol being served in Metamora. He feels that Metamora is a good and quiet town and that having a restaurant that sold beer and wine would change its unique character for the worse.⁷
 2. Anna Belle Hooker, a 28 year resident of Metamora and recently retired. She stated that applications for alcohol permits have been considered throughout the years for Metamora and have always been denied. Metamora is different than anyplace else. Its unique character produces a lot of family-based tourism with children roaming throughout the streets of the town. She felt that if people wanted to have a drink, they could go to the Hearthstone and that Metamora is not the place for an alcoholic beverage permit.
 3. Rod Seedling, associate pastor of the Bible Baptist Church in Metamora. He is worried about the potential of intoxicated drivers on the roads in Metamora that such a permit premises might produce.
 4. Ray Halpin, 15 year Fire Chief of the Metamora Volunteer Fire Department with 23 years experience. He testified that he has seen a lot of death due to alcohol and that he is worried about how an alcohol permit in Metamora would contribute to this.
 5. J.D. Robbins, who lives directly behind the proposed permit premises.⁸ He has lived in the area for approximately three (3) years and has nothing against the Lucases, but is totally opposed to the permit for beer and wine at that location. He and his sister rent some cottages in the area and are concerned about the possible noise level which would result from the proposed permit premises serving alcohol. Metamora is a quiet, historical town and to place an alcohol permit on Main Street would adversely impact that.
 6. Dorothy Riley, a fifty (50) year resident of Metamora. She said that currently, the town shuts down at 6:00 p.m., and there is no traffic after that point. An alcohol permit at the proposed location would disrupt that. It is not necessary and will bring nothing but trouble to Metamora.

⁶ Mr. Howell indicated that many years ago, he was released from the penitentiary. While this HJ is not privy to his criminal history, it could have possibly played a part in the denial of his request for a license at that time. *See*, IC 7.1-3-4-2(a)(2).

⁷ This HJ would note that the Indiana Department of Natural Resources has designated Metamora as one of 15 State Historical Sites.

⁸ It appears from the testimony that at least one of Mr. Robbins' cottages and the proposed permit premises are separated by around thirty (30) feet.

7. Paul Hendricks, a Metamora resident. Although he is not opposed to alcohol in general, he does not want a permit in Metamora. He has his life investment on Main Street.⁹ The location is too close to a shrine which is next to the Odd Fellows Hall in Metamora.¹⁰ In any event, it is unnecessary for this town.
8. Rose Bush, operator of the Whitewater Inn and another pizza shop in Metamora. The attractiveness of Metamora is the quaintness of the town. She described Metamora as a quiet, safe place where families, not just Christian families, can live and raise their children. On a recent weekend while the proposed permit premises was advertised in anticipation of this hearing, she and other residents polled some of the visitors who say they regularly come to Metamora, but were upset when they saw the orange advertising sign on the door of the proposed permit premises. Many of them said that if the permit was awarded to that location, that they would not come back. She also acknowledged that some individuals asked where one could be served a beer in Metamora, and she said that those individuals were not the kind of people she wanted to see in the town.
9. Jean Owens, owner of a full service country inn in Metamora. She is concerned about the lack of public restroom facilities in Metamora. She operates a dining room which does not have a public restroom because of septic tank problems.¹¹ During the evenings when the proposed permit premises would be open and selling beer with dinner, it has no public restrooms and with all of the shops closed, the nearest public restroom is approximately four (4) blocks away.
10. Linda Rich, a 60 year resident of Metamora. She has raised her family here and they have been able up to this time, to go anywhere in town and not worry about traffic, even though the town has few sidewalks. She feels that the town would be better off without a permit located within its midst.
11. Dorothy Combarter, a 30 year resident of Metamora. She has a small gallery shop and, although she likes pizza very much, she is opposed to having an alcohol permit in Metamora. She said that with the Hearthstone Restaurant only ½ mile away, that was close enough for an alcohol outlet. She also recalled the time some years past where a retired police officer and his wife were struck by a drunk driver at the top of a hill in Metamora, resulting in the death of the wife, and that people are simply afraid of what would happen if an alcohol permit were located in the Main Street historic district.

⁹ This HJ cannot glean from Mr. Hendricks's testimony exactly what this "life investment" on Main Street is, but will assume that it is connected to his livelihood.

¹⁰ The exact nature of this shrine is unclear, but it apparently has religious significance. It also may be within 200 feet of the proposed permit premises. However, despite Mr. Hendricks' feelings to the contrary, it does not qualify as a church within the meaning of IC 7.1-3-21-11.

¹¹ These problems are apparently not isolated to Ms. Owens, and her concerns were not adequately rebutted by the Lucases.

12. Cecil McCray. His wife has owned a business in the historic district for around 15 years. He is concerned that alcohol permits bring crowd control problems. He feels that with the current tourist crowd, that the sheriff's department is stressed enough and that they do not have the sufficient manpower to deal with the additional crowd problems that would flow with an alcohol permit.
 13. Wilson Jenkins, a 60 year resident of Metamora. Having 12 grandchildren and 2 great-grandchildren, he is adamantly opposed to a permit at the proposed location.
- D. The following exhibits were introduced before the LB in favor of the remonstrators and against the permittee in this cause: None.

III. EVIDENCE BEFORE THE ATC

- A. The following individuals testified before the ATC in favor of the permittee in this cause:
1. John and Yvonne Lucas, applicants for the proposed permit. Mr. Lucas testified that he believes having a beer and wine permit at his restaurant will draw more people to Metamora. He believes that the lack of such an offering causes people to decline to visit Metamora.¹² Mr. Lucas stated that he and his wife purchased the proposed permit premises with the intention of placing a beer and wine permit there. They had to invest several thousand dollars in the premises because it had been vacant for several months before they bought it.¹³ Without the permit, they do not feel that the business will be a success.¹⁴ They do not understand the current opposition in Metamora given the fact that they had no problems with their package liquor store in Centerville. They were able to obtain temporary permits for the Canal Days Festival with no problem and see no reason why there is opposition to their request for a permanent permit.¹⁵ Both Mr. and

¹² The draw of this town is its history and the restored Main Street business area. This HJ is skeptical to the argument that people will determine to visit a state historical site solely on whether there is a restaurant which serves beer.

¹³ Although this HJ is sympathetic to the fact that the Lucases are looking to the profits from an alcoholic beverage permit to help them pay off the debt they have incurred in fixing up the permit premises, the fact remains that there has never been an alcoholic beverage permit at this location, or indeed, at any location within the historic canal district. This they should have been aware of at the time they made this investment.

¹⁴ This HJ has no choice but to wonder why this business needs a permit to succeed when there are no other permits in this area, yet businesses still appear to be succeeding.

¹⁵ An annual festival highlighting the historic canal district of Metamora which is held in October of each year. According to Mrs. Lucas, the beer sales from the canal festival were approximately \$1500 for the three day period. This HJ would agree that such figures show some evidence of desire at least with respect to that occasion. However, Mrs. Lucas also testified that they were denied a temporary permit for the

Mrs. Lucas testified that they receive requests daily from patrons who inquire about the availability of beer and wonder when they will receive permission to serve it at their location.

2. Dennis Kolb, a Brookville real estate agent who has owned business property in Metamora.¹⁶ He has resided in Franklin County all of his life. He described Metamora as historic and a wonderful little town that draws tourists from all over the region. He testified that many of the businesses in the town are owned individuals from cities like Indianapolis and Cincinnati. He testified that the proposed permit premises was the former site of a coffee and sandwich shop and was vacant for less than one year before the Lewises purchased the property. There has not been an alcoholic beverage permit at that location prior to the instant application. He has done a significant amount of traveling and one of his favorite stops in any local community is a local pizza restaurant that serves beer and he laments that there is no such establishment in Metamora. He believes that having such a restaurant in Metamora would not unfavorably change the community and would be an asset to it. He said he had talked to many residents of Metamora about the issue and that there are people who are in favor of it and those opposed. Neither side seems to be willing to moderate its views. Those against it view the Main Street area of Metamora as “hallowed ground” where a permit has never been issued and should not ever be. Those in favor say that because the tourism industry has taken a hit since the September 11, 2001 terrorist attacks, that these additional draws are needed.¹⁷
3. David E. Basham, a resident of Liberty. He and his wife have owned a gift shop in Metamora for 12 years. He believes that a beer and wine permit for Metamora would be an asset. He testified that many customers of his have asked where in the town they could get a beer, and their only option was to leave the tourist district and go out to Highway 52 to the Hearthstone Restaurant.
4. Joanne L. Basham. She believes that granting a permit to the proposed premises would help business in the town financially because it would allow people to buy all of their food and drinks in the town as opposed to having to leave the historic portion of the town to have a beer.

annual Christmas Walk (she did not disclose why and the record does not otherwise reveal the reason) and thus their revenues were lower for that festival. However, comparing the process of obtaining a temporary permit with that of a permanent permit is like comparing apples and oranges. Temporary permits are not advertised and do not go through the local boards. All that is required for them to be granted is the approval of the district excise police office. The public remonstrance process is simply not impacted. *See*, IC 7.1-3-6-1, *et seq.*, and 905 IAC 1-11.1-2. Also, by their very nature, they terminate at the earlier of the conclusion of the event for which they were issued or 15 days.

¹⁶ Mr. Kolb does not currently own business property in Metamora, though he has owned three businesses there in the past.

¹⁷ There is no credible evidence in the record to support this argument. *See*, fn. 12, *supra*.

- B. The following exhibits were introduced before the ATC in favor of the permittee in this cause:
1. Photographs of the exterior of the proposed permit premises.
 2. Photographs of the interior of the proposed permit premises.
 3. Photograph of the restroom of the proposed permit premises.¹⁸
 4. Petition containing approximately 122 names and addresses and/or telephone numbers of patrons of the proposed permit premises in favor of the permit application in this matter.
 5. Petition containing approximately 40 names and addresses of individuals in favor of the permit application in this matter.¹⁹
 6. Financial statements showing projected income with and without the benefit of a beer and wine permit.²⁰
 7. Tourism brochure of historic Metamora.²¹
- C. The following individuals testified before the ATC in favor of the remonstrators and against the permittee in this cause: None.
- D. The following exhibits were introduced before the ATC in favor of the remonstrators and against the permittee in this cause: None.²²

IV. FINDINGS OF FACT

1. The Permittee, Pappy's Pizza, LLC, d/b/a Pappy's Pizza, 19054 Main Street, Metamora, Indiana 47030 (Permittee) is the applicant of a type 111 and 220 Alcohol and Tobacco Commission (ATC) permit, #RR/SS24-20585. (ATC File).
2. Pappy's Pizza, LLC, is owned 100% by John and Yvonne Lucas. (ATC File).

¹⁸ This HJ would note that the photographs depict an attractive, neat and clean premises, both inside and out, which appears to blend in well with its neighbors

¹⁹ These appear to be the same petitions introduced before the LB.

²⁰ This financial statement shows that the difference between having or not having a beer and wine permit in the proposed permit premises appears to be around \$20,000. However, it is not clear what assumptions were used to estimate the impact of the proposed permit.

²¹ Even though it lacks a scale reference, this exhibit is very helpful. It shows clearly the layout of the town, and in particular, the location of the proposed permit premises and its relationship to other businesses in the area. These latter two exhibits were presented post-hearing. It is this HJ's understanding that approximately ½ mile separates the proposed permit premises from the Hearthstone Restaurant on U.S. 52 east of town. Using that assumption, it appears that slightly less than ½ mile separates Baner Street from Basin Street, which appears to have the most significant concentration of businesses along the canal. It therefore appears that the principal area of activity in this town is within ¼ of a mile radius of the permit premises.

²² This HJ would note the receipt of a letter prior to the appeal hearing from the owner of the Duck Creek School Fudge Shop, objecting to the proposed permit in this matter. Although this document does not constitute an official pleading nor is its author being accorded remonstrator status within the meaning of 905 IAC 1-36-2, it simply echoes the feelings of those who testified before the LB in opposition to the permit application.

3. The Lucases are of good moral character and of good reputé within the community. (LB Hearing; ATC Hearing).
4. The proposed permit premises will generate at least \$200,000 in gross sales of food over a two (2) year period. (ATC Hearing; ATC File).
5. The location for the proposed permit is in the unincorporated town of Metamora, Indiana. (LB Hearing; ATC Hearing).
6. Metamora is a historic district and has been so recognized by the State of Indiana Department of Natural Resources. (ATC Records).
7. The proposed permit premises is located on Main Street along the historic Whitewater Canal walk with the general area bounded on the north by U.S. Highway 52, to the east by Columbia and Basin Streets, along with a curvature of U.S. 52 heading in a southeasterly direction, along with shopping and other tourist attractions which appear to extend approximately ¼ mile to the west of the proposed permit premises. (ATC File).
8. The proposed permit premises is located within State Historical Site designated by the Indiana Department of Natural Resources, one of fifteen (15) such designations throughout the state. (ATC Records).
9. There has never been an alcoholic beverage permit located within the boundaries of historic Metamora. (ATC Records).
10. At the time that the Lucases purchased the permit premises, they were aware that there was no permit there and made the investment accordingly.²³
11. The nearest alcoholic beverage permit is located at the Hearthstone Restaurant out on Highway 52, which is approximately ½ mile away from the permit premises, and away from the pedestrian and primary tourist area of the Whitewater Canal. (ATC Records; LB Hearing).
12. Metamora has a unique historical small town feel that would be changed with the placement of an alcoholic beverage permit in its midst. (LB Hearing).
13. A cross-sampling of the residents of the town and area appeared and testified that the presence of an alcoholic beverage permit in the historical district would be detrimental to the town, is unwanted and would damage the historic character of the town. (LB Hearing).²⁴
14. The permittee produced only one independent person who was willing to testify in favor of the permit in this cause. (LB Hearing).
15. The placement of an alcoholic beverage permit in this location would have an adverse impact on the historic district. (LB Hearing).
16. The community does not want this permit at this location. (LB Hearing).

²³ This HJ has no information to suggest that the purchase price did not fairly represent the value of the location without the permit. Although it seems clear that the Lucases have spent a significant amount of money on the premises which they were hoping to recoup partially through the sale of beer and wine at the proposed permit premises, doing so without a permit in hand was a risk which they undertook and does not itself justify the awarding of the permit in these circumstances.

²⁴ This HJ is not unmindful of the petitions submitted by the permittee both before the LB and before the Commission, which, along with the testimony of the Lucases stating that their customers want beer and wine with their pizza does constitute some evidence of need. However, the issue becomes the weight to be given to them. They are clearly hearsay, and although admissible, do not, under these circumstances, carry heavier weight than the live testimony of those who protested the application in person.

17. The lack of a desire appears to outweigh any need for the permit at that location. (LB Hearing).
18. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

V. CONCLUSIONS OF LAW

1. The permittee, Pappy's Pizza, LLC, d/b/a Pappy's Pizza, 19054 Main Street, Metamora, Indiana 47030 (Permittee) is the applicant of a type 111 and 220 Alcohol and Tobacco Commission (ATC) permit, #RR/SS24-20585.
2. The Lucases are qualified to hold the permit at issue. IC 7.1-3-4-2; IC 7.1-3-16.5-2.
3. The ATC may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. 905 IAC 1-27-4.²⁵
4. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).²⁶
5. "Desire" means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).
6. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*
7. Where permittee shows that its customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).
8. When remonstrators cite to the evils of alcohol in opposing a permit, it goes to the impact of such services on the neighborhood or community. 905 IAC 1-27-4(d).
9. The Commission may reverse the LB's action in denying renewal of said permit if it finds that the LB's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without

²⁵ That is not to say that an equal showing must be made with respect to each component. There may be instances where the need is greater than the desire; (e.g., where there are few outlets in the area) or where the desire is greater than the need; (e.g., an applicant who wishes to place an available permit in an otherwise competitive area).

²⁶ Where the choice for the product is slim or nil, that will usually show a need, which would shift the burden to remonstrators to show that there are alternatives, or that whether or not need exists, there is simply no desire for the product. *See, John Malone Enterprises, Inc., v. Schaeffer, et.al.*, (1996), Ind.App., 674 N.E.2d 599, where the Court of Appeals upheld the denial of a package liquor store permit in Shipshewana, LaGrange County, where the overwhelming majority of the population were of Amish or Mennonite faith, each which required abstention from alcohol, and because of the unique character of Shipshewana, there were no alcohol outlets anywhere in the community. That case is instructive in that the Court of Appeals recognized a small community's right to restrict the availability of alcohol within its jurisdiction.

- observance of procedure required by law; or (e) unsupported by substantial evidence. IC 7.1-3-19-11.
10. The substantial evidence standard is met if a reasonable person could conclude that the evidence and the logical inferences to be drawn therefrom are of such a substantial character and probative value as to support the administrative determination. *Indiana Alcoholic Beverage Commission v. Edwards*, (1995), Ind.App., 659 N.E.2d 631.
 11. A reasonable person could conclude that the evidence and the logical inferences therefrom which were presented at the LB hearing were of such a substantial character and probative value to support the LB's recommendation that the community did not desire a beer/wine restaurant in Metamora and that such a restaurant would detract from the character of the community. *John Malone Enterprises, Inc., v. Schaeffer*, (1996), Ind.App., 674 N.E.2d 599, 606.
 12. The Commission should not substitute its judgment for that of the LB unless the weight of the evidence presented pointed to one conclusion and the LB reached the opposite conclusion. IC 7.1-3-19-11.
 13. The LB's action in denying the application of the Lucas's permit in this matter was not (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. *Id.*²⁷

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the LB to deny the application in this matter was based on substantial evidence and must be sustained. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was not sufficient to overturn the recommendation of the LB or to issue a finding in favor of the Permittee and against the recommendation of the LB. The appeal of Permittee, Pappy's Pizza, LLC, for the application of this Type

²⁷ That is not to say that the Lucases are out of luck from this point forward. However, it must be stressed that this Commission values the recommendations of the local boards throughout the state and does not take lightly overruling those recommendations unless the decision cannot be supported under any reading of the record. Their battle is with the local community over this issue. They are free to work the local residents, to drum up support for this permit and to reapply for a permit at any time after October 16, 2004 (see, IC 7.1-3-4-2(a)(12)). However, under the record presented here, this HJ is utterly convinced that the placement of this permit in the face of this remonstrance would be the wrong thing to do and that the negative reaction would far outweigh any positive response. This HJ would also note that he took the time to review all of the written records of all of the Franklin County LB hearings since 1998, and has determined that (1) no new permits were sought in Metamora during that time; (2) no significant remonstrances were encountered by the Franklin County LB at any hearing during that time; and (3) that the instant case is the only instance where the citizens in the affected area were motivated to organize a remonstrance to deny this permit. In short, this does not appear to be a county where some group of remonstrators try to deny a certain type of permits or oppose all permits because they think alcohol is evil (although those remonstrances certainly do occur throughout Indiana). Therefore, the fact that these people felt as strongly as they did about this matter is very telling and thus, the decision of the LB seems in this matter to truly most reflect the needs and desires of the community.

111 permit, #RR24-20585 is denied and the recommendation of the LB in this matter is sustained.

DATED: _____

MARK C. WEBB, Hearing Judge